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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

GEORGE SABIN,
Plaintiff,

vs.

CURT MANUFACTURING, INC.,
Defendant and Counterclaimant,

Case No.: 2:08-CV-1852 PHX-SRB

**PROPOSED JOINT CASE
MANAGEMENT PLAN (FRCP 16(b),(c),
26(f))**

Date: _ February 23, 2009 _

Time: _ 9:45 A.M. _

**Place: _ Courtroom of the Honorable Susan
R. Bolton**

The Honorable Susan R. Bolton

1 Under this Court's Order dated December 19, 2008 and under Federal Rule of
2 Civil Procedure 26(f), the parties submit the following Joint Proposed Case Management
3 Plan.

4
5 **I. NATURE OF THE CASE**

6 **A. Plaintiff's Statement**

7
8 This is a free speech case in which a manufacturer of a defective trailer hitch has
9 invoked meritless trademark claims in an effort to suppress a consumer criticism site that
10 calls public attention to the product defect.

11 This case arose from a consumer criticism site created by the plaintiff, George
12 Sabin, about a defective product made by the defendant, Curt Manufacturing Company,
13 which, in Sabin's opinion, had caused a temporary total loss of control to a vehicle and
14 trailer driven by Ted Stimpfel, with his son, on a busy freeway, a serious situation which
15 could have caused death to Ted Stimpfel and his son. Sabin's criticism is that, although
16 Curt had redesigned its model hitch, it failed either to recall the defective products or to
17 notify previous purchasers of the defect. To call attention to this problem, Sabin
18 registered a domain name that reflected the target of his criticism – curt-mfg.com – and
19 created a web site to post there.

20 When Sabin's web site first opens, the viewer hears the high-pitched tone of a
21 woman screaming, followed by circus music that plays in the background. At the very
22 top of the web site is a prominent disclaimer, "This website is not affiliated with Curt
23 Manufacturing, Inc. For their website, click here;" embedded in the word "here" is a
24 hyperlink to Curt's own web site. The site then gives Curt's name and location, and, in
25 the largest type on the entire website appear the words "CATASTROPHIC HITCH
26 FAILURE!" The web site then proceeds to explain Sabin's criticism using prominent
27 photographs of broken equipment along with highly critical text; viewers are asked to
28 forward any information they may have about failures of the Curt hitch. At the end of the

1 web site, Sabin explained that his web site was a non-commercial consumer criticism
2 site, and set forth a parody of Curt's logo, turning its name into "Curt Manufacturing"
3 and showing Curt's hitch as being fractured, with a skull and cross-bones beside the logo.
4 Finally, the web site notes Curt's effort to suppress the web site by filing a complaint
5 under the Uniform Dispute Resolution Procedure.

6 On or about August 6, 2008, Curt complained to GoDaddy, the Internet Service
7 Provider with which Sabin had registered his domain name. GoDaddy forwarded a copy
8 of the complaint to Sabin. The complaint contended that the web site both defamed it
9 and infringed Curt Manufacturing's trademark, and demanded that the web site be taken
10 down by August 11, 2008; otherwise, Curt said it would begin legal proceedings. Sabin
11 timely responded to this email. Curt subsequently filed a complaint with the National
12 Arbitration Forum, invoking the Uniform Domain-Name Dispute Resolution Procedure
13 ("UDRP"), as permitted by the registration agreement which Sabin accepted under the
14 requirements of the Internet Corporation for Assigned Names and Numbers ("ICANN"),
15 which administers the system of assigning domain names under contract with the United
16 States Department of Commerce. The UDRP provides for a "mandatory administrative
17 proceeding" that may be invoked by a complaint alleging that a given domain name
18 infringes trademark rights, subject to de novo judicial reconsideration in the event that
19 either party chooses to bring the controversy to federal court either during or after the
20 UDRP process is completed.¹ Curt indicated in its complaint that it would accept
21 jurisdiction to contest its claims in the courts located at the office of GoDaddy, the
22 domain name registrar, which is located in Arizona.

23 The panelist having ruled in Curt's favor, Sabin then filed this action for a
24 declaratory judgment of non-infringement. Because section 4(k) of the UDRP provides
25 that transfer of the domain name is stayed pending final court action so long as

26 ¹*Barcelona.com, v. Excelentísimo Ayuntamiento De Barcelona*, 330 F.3d 617, 626 (4th Cir.
27 2004); *Dluhos v. Strasberg*, 321 F.3d 365, 372-73 (3d Cir. 2003); *Sallen v. Corinthians*
28 *Licenciamientos LTDA*, 273 F.3d 14, 28 (1st Cir.2001); *Compana, LLC v. Aetna, Inc.*, 2006 WL
1319456, at *3 (W.D. Wash. 2006).

1 declaratory relief is sought in the court whose jurisdiction is accepted in the UDRP
2 complaint, Sabin sought the declaration from this Court. Curt has filed a counterclaim
3 alleging trademark infringement, cybersquatting, and breach of the UDRP.

4
5 **B. Defendants' Statement**

6 This case involves Plaintiff's Declaratory Judgment Action and Curt
7 Manufacturing, Inc.'s ("Curt Mfg") counterclaims all surrounding a domain name and
8 website at www.curt-mfg.com. Plaintiff's Declaratory Judgment Action seeks a ruling
9 that it does not violate:

- 10 a) 15 U.S.C. 1114 (trademark infringement);
11 b) 15 U.S.C. 1125(a) (false designation of origin);
12 c) 15 U.S.C. 1125(c) (trademark dilution); and
13 d) 15 U.S.C. 1125(d) (cyberpiracy);

14 and further seeks a ruling that

15 e) the decision of the National Arbitration Forum finding Plaintiff in violation of
16 the UDRP is null and void.

17 Curt Mfg's counterclaims are for four of the five parts of Plaintiff's Declaratory
18 Judgment Action, namely:

- 19 a) 15 U.S.C. 1114 (trademark infringement);
20 b) 15 U.S.C. 1125(a) (false designation of origin);
21 d) 15 U.S.C. 1125(d) (cyberpiracy); and
22 e) breach of contract (UDRP).

23 Further background of the case is presented in Curt Mfg's Responsive Memorandum
24 Opposing Plaintiff's 12(b)(6) and Summary Judgment Motion.

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II. LIST OF ELEMENTS OF PROOF NECESSARY FOR EACH COUNT OF THE COMPLAINT AND EACH AFFIRMATIVE DEFENSE

A. Plaintiff's Claim for Reverse Domain Name Hijacking

To prevail in his claim of Reverse Domain Name Hijacking under 15 U.S.C. § 1114(2)(D)(v), Sabin must establish that:

- he is the domain name registrant;
- his registered domain was suspended, disabled, or transferred under the registrar's policy as described under 15 U.S.C. § 1114(2)(D)(ii)(II);
- Curt Manufacturing is on notice, by service or otherwise, of the action; and
- Sabin's use or registration of the domain is not unlawful under the Lanham Act.²

B. Defendant's Claims

To prevail in its claim for breach of contract, Curt Mfg must prove that:

- a) Plaintiff entered into a contract;
- b) Curt Mfg was a third party beneficiary under that contract;
- c) Plaintiff breached the terms of that contract; and
- d) Curt Mfg was damaged as a result of the breach.

To prevail in its claim for cyberpiracy under 15 U.S.C. 1125(d), Curt Mfg must prove that:

- a) Curt Mfg owns a mark
- b) from which Plaintiff has a bad faith intent to profit, and
- c) Plaintiff registered, traffics in or uses a domain name that

² *Barcelona.com v. Excelentísimo Ayuntamiento De Bardelona*, 330 F.3d 617, 626 (4th Cir. 2003); 15 U.S.C. § 1114(2)(D)(v).

- 1 (I) in the case of a mark that is distinctive at the time of registration of the
2 domain name, is identical or confusingly similar to that mark; or
3 (II) in the case of a famous mark that is famous at the time of registration of
4 the domain name, is identical or confusingly similar to or dilutive of
5 that mark.

6 To prevail in its claim for false designation of origin under 15 U.S.C. 1125(a),
7 Curt Mfg must prove that:

- 8 a) Plaintiff used in commerce on or in connection with any goods or services a
9 word, term, name, symbol, or device, or any combination thereof, which:
10 b) is likely to cause confusion, or to cause mistake, or to deceive as to the
11 affiliation, connection, or association of Plaintiff with Curt Mfg as to the
12 origin, sponsorship, or approval of Plaintiff's goods, services, or
13 commercial activities by Curt Mfg.

14 To prevail in its claim for trademark infringement under 15 U.S.C. 1114, Curt Mfg
15 must establish that:

- 16 a) Plaintiff is using in commerce or intending to use in commerce in connection
17 with the sale, offering for sale, distribution, or advertising of any goods or services
18 b) any reproduction, counterfeit, copy, or colorable imitation of Curt
19 Manufacturing's registered mark CURT;
20 c) on or in connection with which such use is likely to cause confusion, or to cause
21 mistake, or to deceive.

22
23
24 **C. Plaintiff's Affirmative Defenses**

25 Regarding Curt Manufacturing's claims for trademark infringement and dilution,
26 Plaintiff asserts that Curt Manufacturing's claims are barred based upon the following
27 affirmative defenses:
28

- Sabin makes no commercial use of his web site with Curt Manufacturing's trademark(s);
- Sabin's First Amendment rights to create a gripe web site preempt Curt Manufacturing's trademark claims;
- Sabin's act of creating his website is protected under the fair use doctrine of trademark law to the extent that Sabin's use of Curt Manufacturing's trademark is nominative and is used in the context of a parody.

D. Defendant's Affirmative Defenses

Regarding Plaintiff's claim for Reverse Domain Name Hijacking, Curt Mfg asserts that Plaintiff's claim is barred based upon the following affirmative defenses:

- Plaintiff's Complaint fails to state a claim for which relief can be granted;
- Curt Mfg has a *Noerr-Pennington* right to use judicial process;
- Plaintiff's claim is barred by Plaintiff's unclean hands; and
- Plaintiff's interpretation of the Lanham Act is unconstitutional.

III. THE FACTUAL AND LEGAL ISSUES GENUINELY IN DISPUTE

A. Plaintiff

Plaintiff contends that the following are the factual and legal issues genuinely in dispute:

- Whether, as a matter of law, a link on Sabin's web site to an email address ok@oklaw.us – a non-profit, non-commercial web site promoting consumer protection - classifies Sabin's web site as commercial in nature;
- Whether, as a matter of law, Curt Manufacturing's claims for trademark infringement against Sabin are barred by the First Amendment and by the principles of trademark fair use, including nominative use and parody based upon the purpose and content of Sabin's web site;

- Whether, as a matter of law, Curt Manufacturing can be a third-party beneficiary to the agreement executed between Sabin and GoDaddy – Sabin’s web hosting company; and
- Whether, as a matter of law, Sabin’s act of creating his web site under the curt-mfg.com domain name demonstrates that Sabin had a bad-faith intent to profit from Curt’s trademark.

B. Defendant

Curt Mfg contends that the following are the factual and legal issues genuinely in dispute:

- The extent to which, as a matter of fact, Plaintiff breached the Registration Agreement/UDRP, and the corresponding amount of damage to Curt Mfg;
- Whether, as a matter of law, Curt Mfg is a proper third party beneficiary to the Registration Agreement/UDRP;
- Whether, as a matter of law, the evidence submitted in the National Arbitration Forum proceeding supports a finding that Plaintiff registered curt-mfg.com in bad faith in violation of the Registration Agreement/UDRP;
- Whether, as a matter of fact, Plaintiff’s actions associated with www.curt-mfg.com were in commerce on or in connection with any goods or services;
- Whether, as a matter of fact, Plaintiff’s use of Curt Mfg’s marks was likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association between Curt Mfg and Plaintiff’s goods, services or commercial activities;
- Whether, as a matter of fact, Plaintiff had a bad faith intent to profit from curt-mfg.com;
- Whether, as a matter of fact, CURT, CURT MANUFACTURING, CURTMFG.COM and/or Curt Mfg’s logo was famous under 15 U.S.C. 1125(d) as of June 14, 2008.

1
2 **IV. JURISDICTIONAL BASIS OF THE CASE**

3 The jurisdiction of the case is based upon federal question jurisdiction (28 U.S.C.
4 §§ 1331, 1337 and 1338) and for trademark claims under 15 U.S.C. §§ 1114(1),
5 1114(2)(D)(v) and 1121.
6

7 **V. PARTIES REMAINING TO BE SERVED**

8 All parties have been served in this case.
9

10 **VI. NAMES OF PARTIES NOT SUBJECT TO THE COURT'S**
11 **JURISDICTION**

12 There are no parties in the case that are not subject to the Court's jurisdiction.
13

14 **VII. WHETHER THERE ARE DISPOSITIVE OR PARTIALLY DISPOSITIVE**
15 **ISSUES TO BE DECIDED BY PRETRIAL MOTIONS, AND THE LEGAL**
16 **ISSUES ABOUT WHICH ANY PRETRIAL MOTIONS ARE**
17 **CONTEMPLATED**

18 Plaintiff Sabin has already filed a motion for summary judgment with the court.
19 Sabin believes that all issues in this case can be immediately resolved as there are no
20 material facts that are in dispute in this case – only issues of law. The legal issues are
21 thoroughly discussed in Sabin's motion.

22 Defendant Curt Mfg opposes Plaintiff's motion for summary judgment. Curt Mfg
23 anticipates filing a dispositive motion at or before the conclusion of discovery if the
24 Court does not grant summary judgment on Sabin's summary judgment motion, which is
25 expected, at a minimum, to include Plaintiff's reverse domain name hijacking claims and
26 Curt Mfg's contract and cyberpiracy claims.
27
28

VIII. SUITABILITY FOR REFERENCE TO A MAGISTRATE JUDGE

The parties do not believe this case is suitable for a magistrate judge. The case has already been removed from the magistrate judge originally assigned to the case.

IX. STATUS OF RELATED CASES PENDING BEFORE OTHER COURTS OR OTHER JUDGES IN THIS COURT

There are no other related cases pending before other courts or other judges in this court.

X. SUGGESTED CHANGES, IF NECESSARY, IN THE TIMING, FORM, OR REQUIREMENT FOR DISCLOSURES UNDER RULE 26(A), FEDERAL RULES OF CIVIL PROCEDURE, INCLUDING A STATEMENT OF WHEN INITIAL DISCLOSURES WERE MADE OR WILL BE MADE

The parties shall exchange initial disclosures on **February 16, 2009**. To satisfy the requirements of Fed.R.Civ.P. 26(a), the parties are filing with the Clerk of the Court a Notice of Initial Disclosure, rather than copies of the actual disclosures.

XI. PROPOSED SPECIFIC DATES FOR:

A. Discovery;

The parties propose a discovery cutoff date of **November 6, 2009**, by which all fact- and expert- discovery including answers to interrogatories, production of documents, depositions and requests to admit must be completed.

B. Deadline for Filing Dispositive Motions;

The parties propose that the deadline for filing dispositive motions shall be **December 18, 2009**.

1 **C. Dates For Disclosure of Witnesses and Full and Complete Expert**
2 **Disclosures under Federal Rule of Civil Procedure 26(a)(2)(c);**

3 The Plaintiff shall disclose the identity of all persons who may be used at trial to
4 present evidence under Fed.R.Evid. 701, 702, 703, 704, and 705 no later than **July 8,**
5 **2009.**

6 The Defendant shall disclose the identity of all persons who may be used at trial to
7 present evidence under Fed.R.Evid. 701, 702, 703, 704, or 705 no later than **August 5,**
8 **2009.**

9 Rebuttal experts, if any, shall be disclosed by **September 4, 2009.**

10 The disclosures of the identities of all persons who may be used at trial to present
11 evidence under Fed.R.Evid. 701, 702, 703, 704, or 705 shall also include all of the
12 disclosures required by Fed.R.Civ.P. 26(a)(2)(B) if the witness is either (1) retained or
13 specifically employed to provide expert testimony in the case, or (2) is an agent or
14 employee of the party offering the testimony whose duties regularly involve giving expert
15 testimony. No deposition of any expert witness shall occur before the disclosures
16 concerning expert witnesses are made.

17
18 **D. Pretrial disclosures under Rule 26(a)(3) of the Federal Rules of Civil**
19 **Procedure; and**

20 The parties propose a deadline to finally supplement all discovery, including
21 material changes in expert witness opinions and disclosure, pursuant to Fed.R.Civ.P.
22 26(a)(3), of all exhibits to be used and all witnesses to be called at trial, on or before
23 **November 20, 2009.**

24 **E. Scheduling of the final pretrial conference (allowing sufficient time for**
25 **briefing dispositive motions (see LRCiv 56.1) plus 60 days)**

26 The parties propose that the final pretrial conference shall be **May 7, 2010.**
27
28

F. Additional Deadline

The parties propose that all Motions to Amend the Complaint, and to join additional parties shall be filed no later than **April 17, 2009**.

XII. THE SCOPE OF DISCOVERY AND WHETHER DISCOVERY SHOULD BE CONDUCTED IN PHASES OR SHOULD BE LIMITED TO OR FOCUSED ON PARTICULAR ISSUES

The parties agree that discovery should not be conducted in phases and should be focused on the particular issues derived from the claims against each party, namely trademark infringement, false designation of origin, cyberpiracy, breach of contract, and related defenses.

XIII. SUGGESTED CHANGES, IF ANY, TO THE DISCOVERY LIMITATIONS IMPOSED BY THE FEDERAL RULES OF CIVIL PROCEDURE AND LOCAL RULE OF CIVIL PROCEDURE 16.2

At this time, the parties do not anticipate the need to modify the discovery rules under Rule 16.2 of the F.R.C.P.

XIV. ESTIMATED DATE THAT THE CASE WILL BE READY FOR TRIAL, THE ESTIMATED LENGTH OF TRIAL, AND ANY SUGGESTIONS FOR SHORTENING THE TRIAL

The parties anticipate the case would be ready for trial by June 8, 2010 with an estimated length of two days. The parties have no suggestions for shortening the trial at this time.

1 **XV. WHETHER A JURY TRIAL HAS BEEN REQUESTED AND WHETHER**
2 **THE REQUEST FOR A JURY TRIAL IS CONTESTED**

3 The parties have not requested a jury trial at this time.

4 **XVI. THE PROSPECTS FOR SETTLEMENT INCLUDING ANY REQUEST OF**
5 **THE COURT FOR ASSISTANCE IN SETTLEMENT EFFORTS**

6 The parties do not believe the prospects for settling the case are good at this time.

7 If the parties wish to address settlement in the future, the parties would welcome the
8 assistance of the Court.
9

10 **XVII. IN CLASS ACTIONS, THE PROPOSED DATES FOR CLASS**
11 **CERTIFICATION AND OTHER CLASS MANAGEMENT ISSUES**

12 This case does not involve a class action.
13

14 **XVIII. WHETHER ANY USUAL, DIFFICULT, OR COMPLEX**
15 **PROBLEMS OR ISSUES EXIST WHICH WOULD REQUIRE THIS CASE**
16 **TO BE PLACED ON THE COMPLEX TRACK FOR CASE**
17 **MANAGEMENT PURPOSES**

18 The parties do not believe this case merits being placed on the complex track for
19 case management purposes.

20 **XIX. ANY OTHER MATTERS THAT WILL AID THE COURT IN RESOLVING**
21 **THIS DISPUTE IN A JUST, SPEEDY, AND INEXPENSIVE MANNER**

22 The parties are unaware of any other matters that will aid the Court at this time.
23

24 Dated this 16th day of February, 2009
25
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27
28

By S/ Lance C. Venable

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CERTIFICATE OF SERVICE

☒ I hereby certify that on February 16, 2009, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Name	Email Address

☐ I hereby certify that on _____, I served the attached document by FIRST CLASS MAIL on the following, who are not registered participants of the CM/ECF System:

Name	Physical or Email Address

s/ Lance C. Venable